

No. 96839-0

SUPREME COURT
OF THE STATE OF WASHINGTON

In Re the Matters of the Recall of:

JEAN BURNHAM, DALE JACOBSON,
RYAN SMITH and SUE CAMERON,

Respondents.

APPELLANT'S REPLY

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A. INTRODUCTION

Now that Councilors Burnham, Cameron, and Smith have given up, the only issue that remains is whether the voters should have the opportunity to recall Mayor Jacobson for the role he played in this story of small-town corruption. The Town Officials's brief is thirty-eight pages of explanations, excuses, and apologies that address the factual underpinnings of the recall charges against Mayor Jacobson. Town Officials's brief sharpens the factual controversy that the recall charges present to the voters, and, as such, accentuates the trial court's error. The Supreme Court should reverse the trial court and send this matter to the voters of the Town of Cathlamet.

B. ARGUMENT

I. The Town Officials failed to object to the trial court's acceptance of supplemental information at the sufficiency hearing and, therefore, should be prohibited from doing so on appeal.

At page 18, The Town Officials, for the first time, complain that they did not have a sufficient opportunity to review and respond to the information provided to the trial court by Wainwright. Washington law generally prohibits claims of error raised for the first time on appeal. The Washington Supreme Court in *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246,

290-91, 840 P.2d 860 (1992), stated:

The appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). Arguments or theories not presented to the trial court will generally not be considered on appeal. *Hansen v. Friend*, 118 Wash.2d 476, 485, 824 P.2d 483 (1992); *In re Marriage of Tang*, 57 Wash.App. 648, 655, 789 P.2d 118 (1990).

* * *

While new arguments are generally not considered on appeal, the purpose of RAP 2.5(a) is met where the issue is advanced below and the trial court has an opportunity to consider and rule on relevant authority. *Bennett v. Hardy*, 113 Wash.2d 912, 917, 784 P.2d 1258 (1990).

Furthermore, the Town Officials make no showing of what they would have or could have done to counter this evidence. Given that the information provided merely supported allegations that were already fully stated in the recall charges, the Town Officials would have been hard-pressed to explain to the trial court how they were prejudiced.

II. Wainwright and the Town Officials essentially agree on the law, but sharply disagree on the facts and reasonable inferences from the facts.

“Article I, Section 33 of the Washington State Constitution provides citizens with a substantive right to recall an elected official.” *In Re Recall of Pepper*, 189 Wn.App. 546, 553, 403 P.3d 839 (2017). The court must be careful not to infringe on this constitutional right by placing unnecessary procedural hurdles in front of petitioners. It is not the court’s place to decide the truth of the charges at issue--“It is the voters, not the court, who will

ultimately act as the fact finders.” *Id.* at 553-54.

Judicial restraint is the touchstone of the court’s inquiry. The court’s own opinions regarding the evidence or the strength of the inferences reasonably drawn therefrom are irrelevant. Moreover, to the extent the court’s opinion regarding the outcome of factual controversies plays a role in this sufficiency determination, the constitutional rights of Wainwright and the citizens of Cathlamet are compromised.

The Town Officials dispute none of this but nonetheless offer page after page of factual argument, factual denials, and alternate facts in support of the trial court’s dismissal. In doing so, they invite the court to do exactly that which is prohibited under RCW 29A.56.140 and Washington common law. There are only two questions before the court. First, could a reasonable voter decide, based on the evidence and reasonable inferences therefrom, that Mayor Jacobson abused his discretion by initiating and ramrodding the purchase of contaminated property from a former town council member at an exorbitant price? A review of the record, with all inferences drawn in favor of Wainwright, leaves little room for dispute on this point. Again, the Town Officials can offer all the arguments and alternate facts that they can think of, but the court’s response should be “tell it to the voters.”

For example, at page 20 of *Respondent’s Brief*, the Town Officials cite Goodroe’s 2007 purchase price of the property (\$75,000.00) and the 2011 tax assessed value of the property (\$75,000.00) as evidence that the 2018 purchase

price of \$68,000.00 is reasonable. It would seem that the most recent tax assessed value, which was \$34,400.00 in 2018, would be more important than the 2011 assessed value. And a professional appraisal done in 2018 would provide a stronger indication of value than an eleven-year-old purchase price. The Town Officials abused their discretion by ignoring the current tax-assessed value and appraisal, not to mention the fact that the property was contaminated and most likely worth far less than the appraised value.

Similarly, the Town Officials claim that they were somehow ignorant of the restrictive covenant and the level of contamination on the property. It is for the voters to decide whether Mayor Jacobson abused his discretion by moving forward with the transaction despite the desperate warnings of Washington Department of Ecology, the Cathlamet Public Works Director, and the town's attorney.

The Town Officials *argue* that the property was unique and, therefore, the appraisal was wrong. While they offer no proof that the alleged uniqueness of the property was not reflected in the appraised value of the property, but they should be given a chance to explain it to the voters.

There is nothing in the record that states that Goodroe was confronted with the appraisal and pressed to lower her price. And even if this happened, there is no explanation for why the Town needed this property so badly that it would pay Goodroe one hundred fifty-eight percent (158%) its appraised value. The Town Officials need to explain this to the voters. Why not do what

most purchasers do and simply refuse to buy the property? Or condemn the property? Counsel for the Town Officials argues that condemnation would have been long and expensive and wasteful, but there is nothing in the record that indicates that this option was even considered. This is simply a lawyer explaining that if his client had done what they should have done, that is, considered condemnation, they would have decided against it and moved forward with what they were going to do anyway. How could counsel know this? The reasonable inference flowing from the Town Officials' failure to even consider condemnation is that they, as admitted to by all three town councilors, were acting out of a desire to help their friend get her money back.

And the list goes on and on. The parties could argue and counter argue endlessly if given the chance, but this is the wrong forum. At most, the Town Officials have offered this court the other side of the factual coin and asked the court to make a factual ruling in its favor. The court cannot do this. The court must accept the factual allegations in the charges as true and consider all inferences therefrom in the light most favorable to Wainwright. *In re Recall of Pepper*, 189 Wn.2d 546, 555, 403 P.3d 839 (2017) ("In this context, 'prima facie' means that, accepting the allegations as true, the charge on its face supports the conclusion that the official committed misfeasance, malfeasance, or a violation of oath of office."); *In re Recall of West*, 155 Wn.2d 659, 665, 121 P.3d 1190 (2005) ("Voters may draw reasonable inferences from the facts;

the fact that conclusions have been drawn by the petitioner is not fatal to the sufficiency of the allegations.”); *In re Recall of Bolt*, 177 Wn.2d 168, 173-74, 298 P.3d 710 (2013)(“court must determine ‘whether, accepting the allegations as true, the charges on their face support the conclusion that the office abused his or her position.’”); *In re Recall of West*, 155 Wn.2d 659, 666, 121 P.3d 1190 (2005) (The recall charge must be “read broadly, as a whole, and in favor of the voter.”).

The trial court did exactly the opposite of this and the Town Officials, by dedicating their brief to factual arguments, explanations, and other-side-of-the-coin inferences, now ask the Supreme Court to do the same.

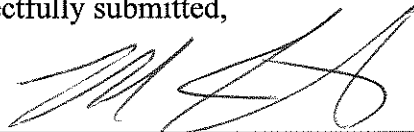
The second question presented demands the same response: Could a reasonable voter decide, based on the evidence and reasonable inferences therefrom, that Mayor Jacobson granted himself the special privilege to exert owner-like dominion and control over town property in violation of RCW 42.23.070(1)? Mayor Jacobson can argue all that he wants that his misuse of Town Property was *de minimis*, as those in his position invariably do, but this is a matter for the voters to decide. The recall charges contain evidence showing that the Mayor treated town property as if it was his own personal property, using it for his business and granting permission to some, and denying it to others, as he pleased. The Mayor’s denials and explanations do not change the record.

C. Conclusion.

The Supreme Court should reverse the Trial Court's dismissal of the recall charges against Mayor Jacobson and remand this matter for consideration of the ballot synopsis.

DATED: July 1, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'MJA', is written over a horizontal line.

MATTHEW J. ANDERSEN, WSBA #30052
Of Attorneys for Wainwright

CERTIFICATE

I certify that on this day I caused a copy of the foregoing APPELLANT'S REPLY to be mailed, postage prepaid, and emailed to Respondent's attorney, addressed as follows:

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DATED this 2 day of July 2019, at Longview, Washington.

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Dear Clerk,

Attached please find a copy of Appellant's Reply Brief for the above-reference matter to be filed with the Supreme Court. The online filing portal is currently not working and I was directed to send the document to this email for filing. Please let me know if there are any further steps necessary.

Thank you,
Margaret Dick

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